VARIOUS DEFINITIONS OF JURAL RELATION

An inspection of the literature, and it is abundant, which attempts in one way and another to provide an understandable definition of jural relation, is likely to evoke the opinion expressed by Jhering in a similar connection—that the pursuit is a trading of silver dollars for paper dollars.[1] But the diversity of views on this fundamental notion is quite tolerable when we recall that the nature of the chief type of jural relation, a right, is still a subject of animated debate. The last edition of Windscheid's *"Pandekten"*, in the chapter on "Rights" exhibits eight full pages of solid type of footnotes referring to scores of treatises and monographs containing discussions which oscillate between the interest theory and the will theory.[2] The list of disputants could at the cost of little effort be considerably increased.[3] The basic idea, law, fares no better—*"Noch suchen die Juristen eine Definition zu ihrem Begriffe vom Recht."*[4] The more fundamental the idea, the greater seems to be the difficulty of definition, or what amounts to the same thing, clarity of thought.[5] It is true, nevertheless, that the difficulty is often avoided as unworthy, and it must doubtless be conceded that in the practical application of legal science, ultimate

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[1]Jhering, *Geist des römischen Rechts*, (5th ed.) IV (*Dritter Teil, erste Abt.*) 327, n. 435: "Among such definitions one exchanges a silver dollar for a paper dollar, and is as far along afterwards, as before. What is a right? 'The power to act, etc.'—here one acquires a paper dollar instead of a silver dollar. What is a power? 'The right to act'—there one gets his silver dollar back."

[2]Windscheid, *Lehrbuch des Pandektenrechts* (9th ed.) I, ii, (i) pp. 155 seq.

[3]Cf. Pound, Legal Rights, in Int. J. of Ethics, Oct., 1915, pp. 92 seq.; see, especially, footnotes pp. 114-116.

[4]Kant, Critique of Pure Reason, Kerbach ed. p. 560; Meiklejohn's tr. (London, 1893) p. 445.

[5]As Reichel has stated it—*"Tot capita, tot sensus.* Nearly every jurist or philosopher who has reflected on the law has made his own definition. One may compare by way of illustration the variegated assortment of definitions of law collected by Rümelin and by Trendelenburg as well as in the monograph of Baumstark (*Was ist das Recht?)"* H. Reichel, *in Krit. V-j-Schr. f. Gesetzgebung u. Rechtswiss., Dritte Folge,* (1907) XI, 211. For a recent attempt to do what at least one writer says is an impossibility (e. g., Terry, Leading Principles of Anglo-American Law, p. 3) see Lévy-Ullmann, *Éléments d'introduction générale à l'étude des sciences juridiques, I, La définition du droit,* Paris (Sirey, 1917).

precision of thought is rarely needed.[6] But whatever may be the attitude to these matters in the art of the law, and however formidable may be the difficulties of attaining solid ground, the science of law cannot abdicate its conscience or disregard its logical mission of searching, in the language of Hobbes, for "perspicuous words, but by exact definitions first snuffed and purged from all ambiguities."[7]

I.

The term "jural relation" scarcely finds a place in books written in English, and in none of them does it receive systematic treatment.[8] Passing, therefore, to the available discussions, we may begin with Savigny.

Savigny speaks of jural relation as "a relation between person and persons determined by a rule of law. This determination by a rule of law consists in the assignment to the individual will of a province in which it is to rule independently of every foreign will."[9]

The provinces according to Savigny in which the mastery of the will is conceivable are: (*a*) the self—a field excluded as not belonging to the law; (*b*) the self expanded in the family—a field partly in the law; and (*c*) the external world which falls entirely in the law and is subdivided into the law of things and the law of obligations.[10] What Savigny clearly has in view is, chiefly, if not entirely, that type of jural relation which involves a correlative

[6]See the remarks of Austin, on the lack of definitions in the French and the Prussian codes (2 Jurisprudence 692, 1070, 1110). Jhering has also remarked that the Roman jurists manipulated their ideas "with the greatest security, in spite of the frequent insufficiency of their definitions": *Geist* (5th ed.) III, 364.

[7]An interesting, but debatable substitute for definition is offered by an American jurist, Prof. Wesley N. Hohfeld, Some Fundamental Legal Conceptions as Applied to Judicial Reasoning, 23 Yale Law Journ., 16, 30: "The strictly fundamental legal relations are, after all, *sui generis*; and thus it is that attempts at formal definition are always unsatisfactory, if not altogether useless. Accordingly, the most promising line seems to consist in exhibiting all of the various relations in a scheme of 'opposite and correlatives'". . . . An examination of Prof. Hohfeld's table and of a recent explanation of it by Prof. Walter Wheeler Cook, 28 Yale Law Journ. 721, is reserved for another discussion.

[8]Terry uses the term as applicable "either to duties or their correspondent rights". Leading Principles of Anglo-American Law (1884) p. 90. Waiving any objection here to Mr. Terry's category of "correspondent" rights, the term "jural relation" is here too restricted for scientific use.

[9]"*System des heutigen römischen Rechts,*" II, § 52 (Holloway's trans., p. 271).

[10]*Op. cit.*, II, § 53.

duty, the so-called rights in a strict sense.[11] Elsewhere he speaks of "the jural relation of which each individual right shows a particular side separated from it by abstraction . . ."[12] indicating as it would seem, that the distinction between jural concepts and legal concepts is only the familiar logical separation of general and special terms. Quite apart from this discussion, it may be noticed, incidentally, that the concrete right is disengaged by abstraction. The "living form" of the jural relation is contrasted with the "bare mechanics" of the legal relation—an attitude thoroughly consistent with Savigny's mystic theory of the nature of law.[13]

Savigny does not undertake to discuss systematically any other type of jural relation than rights in the strict sense, but his contribution is interesting as one of the relatively early discussions in a field which has only in recent decades found extensive treatment. The chief criticism of his definition lies in this, that it is nebulous, descriptive, and that it does not deal with ultimate juristic ideas. To say that the will "is to *rule* independently of every foreign will" is indefinite. The term *rule,* especially, needs further reduction. Furthermore, even as to claims (rights in strict sense) the will does not rule; it is not an exigible will, since it may successfully be opposed by power. Yet Savigny's statement comes close to the truth for any type of jural relation. It correctly emphasizes the power element in jural relations[14] and with some alteration in the direction of concreteness it can, no doubt, be logically adjusted to the facts of legal science.[15] It is not only one of the earliest but also one of the most satisfactory definitions.

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[11]*Subjektives Recht, Anspruch, pretensione, droit-pouvoir, Ken-ri, pravomochia.*

[12]*Op. cit.,* I, § 4.

[13]At least one type, if not the prevailing one, in juristic theory, takes a contrary view, regarding the concrete instance or any other legal phenomenon as the living reality, and any juristic construction beyond that as unreal, artificial, and mechanical. But, however that may be, the distinction between general and special concepts (e. g. jural relations and legal relations) is worth preserving. It may be observed in this connection that Prof. Hohfeld's essay (23 Yale Law Journ. 16) deals rather with jural than legal concepts.

[14]Jhering, with his usual penetration, lays stress on this point. "The specific juristic element of jural relations in ancient Roman law was the power concept". "The content of every jural relation . . . is will, power; the differences of jural relations are differences of powers. *Geist,* (5th ed.) II, 140.

[15]For a criticism of Savigny's analysis from another viewpoint, see Bierling, *Juristische Principienlehre* (Leipzig, 1894), I, 191, *Kritik der juristischen Grundbegriffe,* II, 129. See also, Puntschart, *Moderne Theorie des Privatrechts* (1893), p. 5. Puntschart argues that if a jural relation

When we pass from Savigny to recent definitions we find, as Prof. Kipp has remarked, that they present no material variations,[16] and, as he might have added, that they have, with few exceptions, little direct value.

Merkel states, a jural relation consists of a power on one side, and a duty on the other.[17] This, of course, is clearly incorrect, since, for example, a power to divest a claim (*e. g.*, ownership of land) involves no corresponding burden to assist in its exercise. Merkel distinguishes between claims (which he denominates individualized legal powers) and liberties, but his discussion takes no account of power (*"Befugnis"*) in the technical sense.[18] The only useful addition to legal science is his distinction of simple and complex jural relations—jural relations which have powers on both sides growing out of the same juristic fact.

Merkel's distinction between simple and complex relations seems to be the basis of various recent definitions. Kohler,[19] whose presentation of the matter is, on the whole, the clearest statement to be found, says a jural relation is [includes][20] a right, but that it is more than a right. It is that kind of right which is not reducible to a fixed pattern during its existence; that is to say in the origin of the relation and in its subsequent life history, it is subject to the play of individual influences. Thus ownership is a right but it is not a jural relation. Again a [contract of] sale involves rights but not a jural relation because it is instantly extinguishable by simple performance. The same also is true, he says further, of a mutuum without interest; but the contrary is true of

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can only be realized in concrete rights, then the right is the prius and the jural relation is only the posterius. It is probable, however, that Savigny's definition is closely bound up with his theory of law, as suggested, and, in that case, he is not guilty of the logical fallacy charged.

[16]Windscheid, *Pandekten* (9th ed.) § 37a, n. 1, p. 166.

[17]*Juristische Encyklopödie* (3rd ed.) § 146 sq.; *Elemente der allgemeine, Rechtslehre,* § 20 sq.

[18]Merkel is closely followed by Grueber, *Einführung in die Rechtswissenschaft* (2nd ed.) (Berlin, 1910) § 4, p. 29. Prof. Grueber has benefitted by Bierling's discussion of norms (*Juristische Prinzipienlehre*), but he seems to have overlooked his analysis of jural relations.

[19]*Lehrbuch des bürgerlichen Rechts,* Erster Halbband, 1904, §§ 4 sq., 44 sq.; also his *Einführung in die Rechtswissenschaft* (2nd ed.) § 7.

[20]For the significance of this amendment, see the criticism of the "relation" theory of rights by Roscoe Pound, Legal Rights, Int. Jour. Ethics, Oct., 1915, pp. 112 sq. There is, no doubt, a distinction to be kept in view, in a discussion of rights, between the specific juristic possession of the person entitled,—interest, capacity to control an act, claim—and the entire sum of the elements including the duty (content). For the purposes of this inquiry, the relation alone is under consideration.

a mutuum with interest, or of a lease, because it involves a series of constantly changing duties. Further illustrations of jural relations are the contract of service, and, chiefly, partnership. Obligation rights while involving some elements of individual play, he thinks are too much fashioned by form to be regarded as fair types of jural relations.

While lack of clearness of expression and a spirited style cannot be charged to Kohler, yet it may be objected, as it seems to us, that a valuable juristic term is here sacrificed for a poor end. It is useful to distinguish simple and complex relations, and it may, perhaps, be desirable to sever the type of complex relations into further groups; but to designate certain types of complex relations as jural relations, and others as merely rights, does not appear serviceable.[21]

Kohler clearly marks off *powers* from *rights,* but he appears to include in *powers* the concept of *liberty.* This also is objectionable. Power relations are one of the only two types of generic jural relations, but liberties are not jural in their nature, and the converse of the criticism is here applicable. Where before the term jural relation was sacrificed for a narrow species of jural relation of little importance, here one term is used where two terms are called for, both being of major value in juristic analysis. The defect, however, is not one of understanding, but of application.[22]

Windscheid's analysis has an importance which is reflected by the institutional authority of his book and his recognized learning rather than by intrinsic merit. As a definition it exemplifies in exaggerated form Jhering's description, to which reference already has been made. It is not a case of trading a silver dollar for a paper dollar, but of giving one paper dollar for another. It is a true type of the *circulus in definiendo.* "A jural relation," says Windscheid, "is a legally defined relation."[23] There are two types: first, those created by law, of which ownership is an example; and, second, a situation of fact to which the law attaches legal consequences—for example, possession. If we apprehend Windscheid's point, is not this a distinction without a difference? It is true that the law does not create the *fact* of possession, but if possession is anything

[21]Sternberg's definition (*Allgemeine Rechtslehre,* II, § 4, p. 51, n. 1) is more definitely related to Merkel than is Kohler's.

[22]See *Lehrbuch d. b. Rechts,* I, § 4.

[23]*Pandekten* (9th ed.) I, § 37a, p. 165.

more than a fact—if it is not a bare non-legal situation[24]—if it carries with it a legal power of control over the acts of others,—then how does it differ from ownership which is also based on a situation of fact? The explanation of the distinction seems to be that Windscheid is attempting to straddle the division made by Savigny and by Puchta between relations of fact and relations of law.[25] But the two parts or elements of jural relation cannot be straddled for any scientific purpose, since in effect Windscheid's distinction amounts to saying that jural relations can be created in some cases (e. g., ownership) without any material element of fact.[26] The real importance of the division made by Savigny and by Puchta lies in another field of juristic debate—whether the law is a system of legal rules or of jural relations.[27] Windscheid clearly distinguishes rights (the power over a positive or negative act of another) from powers (that is, power to assign, of recission, etc.). Like Kohler, Windscheid includes under powers the non-jural concept of liberty. Thus, in his discussion of ownership,[28] as pointed out by Thon,[29] he says that ownership means that the owner's will is determinative over an object in the totality of its relations, consisting of rights and powers. Among the powers which the owner has is that of use. Thon's criticism of this passage has stood for many years, and yet the last edition of the text of Windscheid remains unaltered. It is not our purpose at this time to attempt a demonstration of the point that liberty (apart from the rights connected with it) is not a jural concept. Indeed, in the light of what is available on that question, the labor might be considered one of supererogation.

It is worth noticing in this connection that Windscheid names two and only two jural relation concepts. The tendency of recent American and English analysts is to find three and sometimes four fundamental jural ideas of the same generic order. Thus, Terry discusses in detail four kinds which he denominates correspondent

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[24]For an important discussion of "jural conditions" (e. g., capacity, agency, etc.) see Kohler, *Lehrbuch d. b. Rechts,* I, § 49.

[25]Savigny, 2 System, § 52: "A jural relation is made up of two parts. . . . The first may be called the material element of the relation—the situation of fact; the second, the formal element by which the situation of fact is elevated into the plane of law." Puchta, *Pandekten,* § 29.

[26]Gareis, Science of Law, p. 31, n. 1.

[27]Windscheid, *Pandekten* (9th ed.) I, § 13.

[28]*Op. Cit.,* § 167, p. 857.

[29]*Rechtsnorm und subjektives Recht,* p. 289.

rights, permissive rights, protected rights, and facultative rights.[30] Salmond, criticizing Terry's category of protected rights[31] as meaning only the objects of rights, enumerates three concepts—rights, powers, and liberties.[32] Pound[33] finds three of such concepts—rights (corresponding to duties), powers (capacities of creating, divesting, or altering rights), and privileges (immunity from liability). The Yale group under the leadership of Hohfeld[34] has invented a new classification of these ideas which is notable for the energetic application which has been made of it, and it is interesting in the effort to establish it as an official scholastic doctrine. The Hohfeld classification is rights, privileges, powers, and immunities.

Since until recent decades, the treatment of this somewhat complicated matter has been scanty and in the main unsatisfactory in the Pandekten books, the older English texts on formal jurisprudence (which have mainly drawn their material from the Pandect books) such as that of Austin, and in more recent times that of Holland, go no further than a discussion of rights in the strict sense. Insensibly, however, these discussions shift ground unless the other ideas are clearly marked out. Thus, for example, Holland's definition of a legal right[35] taken in connection with his

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[30]Leading Principles of Anglo-American Law, §§ 113-128.

[31]Jurisprudence (3rd ed.) § 76, p. 197, n. 1.

[32]*Op. Cit.*, ch. X, pp. 182 sq.

[33]Readings on the History and System of the Common Law (2nd ed.) p. 413; "Introduction to Study of Law", § 6. Cf. also, by the same author Legal Rights (Int. Jour. Ethics, Oct. 1915, p. 111 sq.) in which, in criticism of Bierling's classification into *"Anspruch"* (claim), *Dürfen* (liberty), and *Können* (power), the author (Pound) proposes to separate *Dürfen* into what it already is, liberty, and into privilege (e. g., "right" of deviation).

[34]See footnote 7, *supra*. *Cf.* also Corbin, Legal Analysis and Terminology, 29 Yale Law Journ. 163.

[35]Jurisprudence pp. 81 sq. Holland defines a legal right in what he says is the "strictest sense of that term", as "A capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others". This is closely followed by an illustration not of a *right*, but of a *liberty*—"the ownership of land is a power residing in the landowner, is its subject, *exercised over the land*, as its object, and available against all other men." This illustration is not decisive on account of the ambiguity of the words italicized, but the explanation of the author (p. 85) removes all doubt—"If a man by, etc., *can carry out his wishes*, etc." If, perchance, as must always be possible when dealing with mere words, the explanation has a meaning beyond the grammatical sense, it may still be objected, that

explanation of what his definition means seems to confuse wholly unlike though related ideas. A similar illustration may be found in the elementary institutional French work of Capitant.[36] Whatever else may be said about it, it is clear enough that concepts so necessary for accurate legal reasoning and scientific discussion should be relieved, if possible, from the perplexity which embarrasses progress in analytical thinking, and is even obstructive to communication of thought.

One of the most lucid and original works in the field of this inquiry is that of Thon.[37] This book is of importance even though the term "jural relation" nowhere appears in it. Thon's book, which was professedly suggested by the celebrated treatise of Binding,[38] deals with norms as applied in private law. In agreement with Binding, and likewise with our not quite obsolete theory which goes back to the absolutism of Hobbes, Thon asserts that "all law consists of imperatives"—commands and prohibitions.[39] Commands result in the alteration of legal relations and prohibitions aim to maintain them. Commands involve a future use of a thing; prohibitions protect a present use.[40] While the point appears not to be categorically stated, it is evidently the author's purpose to show the fundamental concepts through which the law operates to achieve its object. The basic categories which are examined in detail are rights, claims (*Anspruch*), liberties (*Genuss*), and powers (*Befugniss*). Thon seems one of the first writers to sharply mark out liberties and at the same time to state their juristic significance. Liberty, as he shows, is a non-jural idea except that its exercise may become of legal consequence under

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the failure clearly to distinguish right from its cognates is confusing in a discussion which employs terms pointing to other meanings.

Similar objections may be made to Prof. Gray's discussion of rights. Gray, "Nature and Source of Law".

[36] *Introd. a L'étude du droit civil.* (2nd ed.) Paris, 1904, pp. 3, 74. *"Le droit subjectif est un intérêt, d'ordre matérial ou intellectual protégé par le droit objectif, qui donne, à cet effet, à celui qui est investi, le pouvoir de faire les actes nécessaires pour obtenir la satisfaction de cet intérêt."*

[37] *Rechtsnorm und subjektives Recht* (Weimar, 1878).

[38] *Normen under ihre Ubertrctung* (1872-1877).

[39] *Op. cit.*, passim; p. 69 (summary).

[40] *Op. cit.*, p. 288.

circumstances of misuse or non-use.[41] In other words while liberty within its own proper limits, is non-jural, it may break its bounds, or, negatively, it may become a juristic fact by which rights are created in others. A landowner whose rights have been invaded has a claim against the trespasser, but the law does not require the owner to make any use of his land—such use or non-use (within limits) is a matter of liberty.

Rights, according to Thon, are not protected interests (Jhering),[42] but the means by which interests are protected. They rest on the promise of an eventual claim.[43] Claims are complexes of rights and powers—rights against judicial and other officers, and powers to proceed against the wrongdoer. A claim (*actio, interdictum*) does not arise until there is an infringement of a norm. At the same moment of infringement there arises also the so-called "right of suit" (*ius persequendi in iudicio quod sibi debetur*). The term claim includes "right of suit"[44] which is the principal modern substitute for the ancient remedy of self-help. Since claims, including rights of suit, involve no jural relations other than rights in the strict sense and powers, and since, further-

[41] *Op. cit.*, p. 323. The definition of Justinian is in point—*"Et libertas quidem, ex qua etiam liberi vocantur, est naturalis facultas ejus quod cuique ffacere libet, nisi si quid vi aut jure prohibetur*: *Inst.* 1.3, I.

[42] *Geist,* III § 60 sq.

[43] *Op. cit.*, p. 218 sq.

[44] The jural nature of *"Anspruch"* and *"Klagrecht"* is a matter of considerable discussion: see Thon, *Rechtsnorm und subjektives Recht* 257 sq.; for the literature and Windscheid's statement, see his *"pandekten"* (9th ed.) §§ 43, 44, 122. The Anglo-American treatment of the subject does not touch the difficulties which apparently have been found in it by continental jurists. The Anglo-American term, "remedial rights", (Holland, Jurisprudence (11th ed.), cap. XI, XII, XIII,) covers the same ground. Prof. Beale, A Treatise on the Conflict of Law (1916) part 1, seems to find three stages in the situation of a right holder whose rights have been infringed—the primary right (e. g., to have payment of a debt), the secondary right (to have payment from the debtor before action of damages for failure to pay the debt), and the tertiary right (to have procedural damages). Unless modern law in this regard is still under the spell of the time when executive justice was weak, (cf. Lex. Sal., tit. I) it seems unnecessary to have a third right which supplants two other earlier rights; although it would seem in those cases where a demand is necessary after default, there is still a reminiscence of an earlier stage of procedure when the law was full of checks, through the requirement of repeated notices and demands, on the hot blood of the litigant. See, also, the pertinent discussion by Terry, Leading Principles of Anglo-American Law, of the obligation and permissive theories of remedial rights.

more, liberty is non-jural, it follows that there are only two[45] kinds of jural relation,[46] each having many species.

Bierling's[47] analysis of jural relation also is the product of a norm theory. His treatment of the subject is not unlike Thon's, except that the latter is more definite in detail and less given to abstractions; but Bierling's discussion is of more specific utility for our purpose since he presents a clear-cut definition of jural relation.

"All legal noms," says Bierling,[48] "express the content of jural relations, that is to say, relations between persons entitled and

[45]If the view of Schlossman, *Der Vertrag,* be accepted that the law consists only of claims (see Thon, *Rechtsnorm und subjektives Recht,* 170) then there is only one type of jural relation, i. e., power. The view that the law consists, in strictness, only of remedies does not seem to be accepted or widely discussed. It may, perhaps, still be justified by taking a distinction between the strict field of law and the constructions of legal science. Legal science finds it convenient to project a system of rights in order that the phenomena of state justice may be made comprehensible. The law, however, is under no such necessity. It need not go, and does not go, beyond its own activities. In the words of Jhering "the function of law is manifestation. What is not realized is now law". (*Geist* (6th ed.) § 4. The existence of an important field of non-contentious jurisdiction offers no real obstacle to the view. These activities by the state are in aid of its social purpose, but they are no more in the field of strict law than are its administrative functions in maintaining an army, or a hospital. The most generalized formula of legal activity is that stated by Jhering (*"Geist"*, § 4, p. 52, n. 20—this author, of course, is not offered as an authority on the chief question, especially since his definition of right is one of the leading ones accepted in legal science)—which formula is, "If—Then"—*If* one does this or that, *then* such and such consequences will follow. This formula may be applied to all remedies. In a word, the actual field of law is as distinct from a system of rights, or even a body of rules, as space is distinct from geometry. Cf. the remarks of Terry, Leading Principles of Anglo-American Law, § 132, that in the view of Roman institutional writers there are no primary (antecedent) rights in rem, nor, on the other hand (§§ 132, 143) any secondary rights in personam. It may also be noticed in this connection that some continental jurists deny certain primary rights—in one's own person (*e. g.* corporal integrity); thus Enneccerus (*"Lehb. d. bürgl. Rechts"*, I (1), p. 164, I (2), p. 591)—"Personality is not a right but an indestructible quality of the person." See, also, B. G. B. §§ 823 sq.

[46]It will hardly need to be pointed out that this is not Thon's statement but the present writer's inference. Thon, as it seems to us, labors under the difficulty of making a convincing demonstration of his leading proposition that all law consists of imperatives, when he comes to his analysis of powers (see especially, op. cit., p. 346). It is true, the exercise of a power may be prohibited (e. g., a wrong) and, on the contrary, its exercise commanded (e. g., *cessio necessaria*); but it is difficult to see how a discretionary power of appointment, for example, can be regarded, when separated from its effects, if and when exercised, as subject to an imperative, i. e., commanded or prohibited.

[47]*Kritik der Juristischen Grundbegriffe* (1877-83); *Juristische Principienlehre* (1894-98).

[48]*Principienlehre,* I, 145 sq.

persons bound." Jural relations, therefore, consist of claims on one side and duties on the other. Bierling substitutes the term *"Anspruch"* (claim—widest sense) for right (*"subjektives Recht"*) to avoid the difficulties of the narrow use of *"Anspruch"* found in the discussions of civilians. *Anspruch* includes every act which legally must be performed by another. Liberty (*Dürfen*) means a negative situation where there are no opposing legal norms. Power (*Können*) is a legal concept only in so far as it includes within its ambit, claims or duties.[49] We speak of "rights" against others to have a positive act (performance) or a negative act (forbearance). This use of the term is identical with *Anspruch* (claim). In another sense, we speak of the "right" to do or not to do something. This is *Dürfen* (liberty). There is no duty of the person having the liberty nor any duty on the part of others.[50] In a third sense, we speak of a "right" to act with certain consequences. This is *Können* (power).

Bierling attempts to show by examples that powers are complex ideas, and asserts that only so far as they include claims are they to be considered as having a jural character.[51] Thus, where a donor of a gift rescinds, the donee owes what Bierling calls a "limited legal duty" to return the gift to the donor. Again where a *res nullius* has been acquired by *occupatio,* there is a "limited legal duty" due from others to recognize the investitive fact and to refrain from disturbing the occupant.[52] Bierling's formal definition of jural relation is "a relation between a plurality of persons, whose content is formed by one or more legal norms," or, more briefly, a jural relation is a "correlate relation of legal claim and legal duty." Liberty (*Dürfen*) and power (*Können*) are therefore excluded from the sphere of jural relation concepts.

One more rapid survey of a recent review may suffice.

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[49]See the discussion of Bierling's analysis by Pound, Legal Rights, Int. Jour. of Ethics, Oct. 1915, pp. 111 sq.

[50]Del Vecchio, (Formal Bases of Law, Lisle's trans., p. 186, n. 6) criticizes this statement: "In no way can a practical power or right be given without the illegality of its interference being determined by the same system."

[51]*Principien,* I, 180, 183.

[52]If Bierling means to say that these acts have sides—a power side and a claim side—then there is no difficulty. There may be a *power* to rescind a juristic act. The exercise of this power is not correlated by any duty to assist. There is a correlate, however, which according to the terminology of Salmond, *Jurisprudence* (3rd ed.) p. 197, accepted by Hohfeld, 23 Yale Law Journ., 16, 30, may be called a liability. When the power is effectively exercised, but not a moment before, a right may spring into existence which is correlated by duty. Cf. the criticism of Del Vecchio, *supra,* foot-note 50.

Puntschart in a brilliant essay[53] arrives at an entirely different conclusion as to the nature of jural relation from the series beginning with Savigny. He puts aside *"Rechtsverhältniss"* as not a term of art and substitutes *"Rechtsverband"* (jural bond) derived from *"juris nexus"* and *"juris vinculum."* He insists that the modern theory of private rights derived from Natural Law has wholly misconceived the fundamental Roman basis of jural ideas. A system of rights is the very cornerstone of modern theory. In Roman law, while there was a definition of *"actio,"* there was none of *"ius"* in the sense of rights.[54] In the Roman application of legal ideas, norms related to persons, to things, the relations of persons to things and to other persons, and this application of legal norms created legal bonds by which persons were gyved to persons and persons to things for definite purposes within the purview of the law. The author shows by copious references how the "bond" idea runs through the whole system of Roman legal conceptions (that is, *ius, lex, contractus, servitus,* etc., etc.). Rights are not the basis of legal construction in the Roman system, but they are only the products of a fundamental jural bond. The jural bond, therefore, is the fulcrum of Roman legal technic. In modern theory, a system of rights is taken as the basis of legal thinking, and the result has been, as the author attempts to show in detail as to a variety of legal institutions, a multitude of juristic questions which are debated with great industry but with irreconcilable issue. Accordingly, the whole theory of modern private law is falsely bottomed, and needs reconstruction.

Puntschart thinks that Savigny had already vaguely apprehended the *"juris vinculum"* concept in his somewhat indefinite reference to the organic nature of the jural relation.[55] Puntschart also supposes Jhering,[56] Köppen, Karlowa, and, especially, Bekker

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[53]*Moderne Theorie des Privatrechts,* (1893); see also his *Fundamentalen Rechtsverhältnisse des römischen Rechtes* (1885).

[54]Quoting, Bekker, *System d. heut. Pandektenrechtes,* I, 46, n. 1.

[55]Thus Savigny, System (Holloway's trans.) I, § 4: "The jural relation has moreover an organic nature and this reveals itself partly in the coherence of its constituent parts, balancing and limiting one another; partly in the gradual unfolding which we recognize in it, partly in the mode of its arising and passing away."

[56]Citing *Jahrb. f. Dogmatik,* X, 387-580, where Jhering states that the law has an active and a passive phase. The passive phase of law is that situation of fact where a subject or an object of a legal relation is for the time being not in existence (p. 580). It is the situation of *"Gebundenheit"* (constraint) of a person or thing—in a passive sense. The active phase is that where all the elements of a presently effective legal relation are in

were driven by the difficulties of the modern theory, to construct other ideas which would more appropriately answer the demands of legal technic. This attempt to restate the foundations of legal reasoning led to an identification of rights with jural relations, and of jural relations with law. This is seen particularly in the juristic discussion of the origination, duration, and alteration of rights where the question is, what is it, for example, that is altered, when one speaks of an alteration of rights?—is the right altered, or is the jural relation altered? Puntschart argues that the technical difficulties presented by these and similar questions are removed by falling back from rights and jural relations to the idea of a jural bond which is also a "purpose bond"—the bond endures as long as it has any purpose to fulfill. The modern world is still governed by the "will" theory developed in the school of Natural Law and fixed as a philosophical doctrine by Hegel, notwithstanding the efforts of Jhering to infuse into the law a realistic trend. But even Jhering himself did not depart from the conventional legal method in dealing with what he called the internal technic of the law. He still continued to operate with the idea of rights.

The effect of Puntschart's theory is to emphasize duties as was characteristic of the Roman system, instead of rights. He recalls in this connection the often quoted words of Modestinus—*"legis virtus haec est: imperare, vetare, permittere, punire."* But Puntschart apparently does not propose to abolish the concept of rights. It has remained for a more recent writer, Duguit, to say:

"the concept of subjective right falls entirely to the ground. It can be truthfully said that such a metaphysical conception cannot be maintained in an age of realism and positivism such as our own."[57]

Rights if not abolished are at least made subordinate in Puntschart's system to the idea of jural purpose bond. This is shown in his examination of the theoretical difficulties regarding the nature of ownership. "Ownership is that legal bond of a thing with a person by which the thing is appointed to serve *all* the purposes of the person which can availably be realized."

He then proceeds to define a right of ownership as—"the sum

existence. The active phase follows from the passive phase. The passive phase, therefore, is the *"prius"* (Cf. note 15 supra.) See Puntschart, *Moderne Theorie,* pp. 6 sq.

[57] *Les transformations générales du droit privé deputs le Code Napoléon* (1912), § 4 translated in Continental Legal History Series, XI, Progress of Continental Law in the 19th Century, p. 70.

of legal powers which spring from the ownership bond to use a thing for all the purposes of the person which can availably be realized."[58]

This illustration is as good as any other which may be extracted from Puntschart's book to show the significance of his theory. It will be noticed that two ideas are found where one has always served in legal technic. According to the prevailing view, ownership itself is only a kind of right, but according to Puntschart ownership is not a right but a legal bond between a person and a thing. Rights are derivatives of this bond. This necessarily must be so since rights can only inhere in persons and be thought of as availing against other persons. A bond between a person and a thing, whatever else it may be, is not a right. But what is this bond? We might with a lack of generosity quote the author's words on the nature of a jural relation—that it is "an unknown something." It cannot be doubted that the meaning of jural relation has been and is, so far as definitions go, a somewhat obscure concept, but that obscurity is as day to night compared with the hidden outlines of Puntschart's legal bond.

Two observations may be made on this theory.

1. Legal ideas are necessary in any system of law. It is not possible to have an idea of law acting upon social phenomena without a fulcrum of intermediate concepts. The chief way in which legal advantages are distributed is through a system of rights and powers. It is inconceivable that a system of law can exist and function without this intervening mechanical principle. The theory which would strip an automobile of all its parts except the engine and the wheels of the car, is not more unworkable than the theory which would undertake to deliver the force of the law to society without the intervention of a network of connecting ideas called rights. Puntschart, unlike Duguit, does not propose this impossible arrangement,[59] but interposes a new mechanical element, the

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[58]*Moderne Theorie,* p. 74. It is interesting to note that Terry's elaboration of "protected" rights which are juristically similar to the *"Rechtsverbund,"* has the merit of priority of statement. It is not probable, however, that Puntschart had any knowledge of tthe American treatise which was published in 1884.

[59]The realistic tendency of *"freie Rechtsfinding"* is no doubt also at war with the obstacles presented by a formal technic based on a scheme of rights. There is an organic connection—the product of the age—among a great variety of intellectual phenomena with highly diversified applications—politics, religion, science, art—of which the revolt against authoritarianism in legal categories is only a consistent phase. In this movement even such apparently uncongenial attitudes as intuitionism and realism are

juris vinculum, as a kind of distributing center through which legal advantages are apportioned among the members of a legal society as the purpose of the law directs. The norm creates the legal bond and from the legal bond are derived such rights and duties as are appropriate. As already suggested, Puntschart is seeking a basis for an internal teleogical technic. Where Jhering searched in vain for purpose *of* the law, Puntschart seeks to find a satisfactory base for administering purpose *in* the law.

It may be freely acknowledged that there are serious theoretical difficulties in operating without inconsistency, with the conventional theory of rights.[60] This may be seen in the wide divergence of view on nearly every basic legal idea or institution. It may be that the modern theory of rights needs renovation, but it may be doubted whether its theory can materially be aided by creating a new concept which is to stand as a governing principle. It is not impossible that the idea of right, if not too metaphysical, has at least been too abstract and too absolute. If, perchance, that should be found the source of the theoretical difficulty, the apparent remedy lies in the direction of more analysis and refinement of our fundamental concepts, rather than in the development of an intermediate factor which as stated in terms of purpose, will not fail to substitute new difficulties in multiplied variety, for old ones. Again, it is not clear that purpose in norms may not operate directly upon legal claims in the apportionment of legal advantages.

2. While legal ideas—a system of rights and powers—or, if one prefers to emphasize that side, as we think is historically justifiable not only for Roman law but for any system of law—duties and liabilities—are necessary, just as for the communication of ideas, some parts of speech at least are necessary, it does not follow that there must be for all systems of law the same set of legal ideas, much less the same methods of combination. To take the language illustration once more, there may or may not be a method of

inherently congruous in their opposition to formalism and reason. *Cf.* for a view of rights from the standpoint influenced by *"libre recherche"*—Pollack, *Perspektive u. Symbol in Philosophie u. Rechtswissenschaft* (1912) p. 290 sq.

[60]These difficulties of theory are especially found where rights are conditional in any essential element or where they are plural in any essential element. For an illustration of a condition element, we may point to the *hereditas jacens.* A fiction is necessary here. A plural difficulty may be illustrated by *jura in re.* When an easement is created, is the right of ownership diminished, i. e. is the easement carved out of the original right, or is a new right created? Another illustration (discussed by Puntschart in detail *op. cit.,* p. 91 sq.) is suggested by D 8, 3, 18 with D. 8, 6, 15. Scores of similar questions may be quickly instanced.

inflection; but whatever the variations in the communication of ideas there will be fundamental similarities which rest on the likeness of the external world. So is it also with the law. The fact that there are living, contending, and coöperating persons in the external world, makes it necessary to deal with concepts which express these objective realities. It may be objected that this is another kind of natural law, but the objection is beside the point. Since it is admitted that considerable variations may and do exist among the leading systems of law in the methods of distribution of legal advantages, it is not improbable that justice may be administerable according to the plan which the author is at pains to demonstrate the Romans followed, but we incline to believe that the secret of the *juris vinculum* was not lost until its re-discovery by the author, but rather that the chief difference between Roman law and modern law lies in the greater emphasis in Roman law on the *actio* as against rights in modern law.

II.

Situations of fact in the external world are the field upon which the law operates. The great bulk of these facts are entirely outside of the law. They lie beyond the law either because the law is incompetent to deal with them or because even though competent it does not choose as a matter of policy to interfere. Of those situations of fact which fall within the scope of the law, the law attempts to govern their future sequences so far as they are under the control of human will. In this lies the essence of legal activity. The law never influences a past state of fact, but always looks to the future. But the law can not deal with these facts in private law directly; it can only influence future causation through the medium of human wills external to itself. The objective situation, if, and when the law attaches, becomes a legal (jural) relation. Since the law does not act directly, it must operate by means of jural relation where there are opposing or opposable human wills which may influence future facts. In private law, therefore, the jural relation is a fundamental concept; it is the basic idea through which the whole system of legal advantages is realized.

The definitions of jural relation,[61] do not submit of unification.

[61]For further discussions and definitions of jural relations reference may be made in gross to the prolific pandects, institutes, commentaries, treatises on general theory of law, and juristic surveys (*Encyklopödien*) of continental legal literature, and particular reference to the following works not already enumerated in the foregoing discussion: Puchta, *Cursus der Insti-*

They turn and must turn on the ideas of liberty, power, and claim. The chief differences are found in the number of these ideas which are embraced. In some cases, only certain kinds of one or more of these ideas are included. The differences are not worth classifying in detail. From a general point of view, two classifications are suggested: (*a*) subjective and objective; (*b*) monistic and dualistic.

(*a*) The distinct preponderance lies with the subjective definitions—that is to say, definitions which proceed from a starting point of a system of rights. Puntschart's definition is objective, and while his attitude is one widely shared, his definition as a formal expression, stands nearly alone. Furthermore, his *"Rechtsverband"* (*"juris nexus"*) can hardly be taken as a substitute for jural relation by reason of its objectivity—it lacks logical connection with the jural relation concept. Since he has given no analysis of rights, the whole classification may be put aside as incongruous.

(*b*) The monistic and dualistic classification, however, may stand, and it is one of considerable importance for juristic theory. This classification also has a realistic and rationalistic sidelight. From the point of view that the law is what comes to pass, the dynamic theory, power alone is of any juristic consequence. Theory may build up a system of rights and claims, just as science may build up its hypotheses of what nature will do under given conditions. But these theories of rights and hypotheses of nature are neither law in one case nor nature in the other—they are only guesses. The monistic view, therefore, disregards every antecedent element of jural causation not expressed in terms of power. There is no such thing as a right of reputation known to the law, or a right of ownership. If one is slandered or a trespass is committed on land, there is still no right or claim to be compensated, known to the law. It is merely an hypothesis that there are such primary and secondary rights because it seems irrational that the law would take any notice of a claim for state interference unless the law also meant to say that such rights existed before infringement—*post hoc, propter hoc.* The answer which may be made is that historically the law everywhere begins as a system of procedure,

tutionen, p. 50 sq.; Stahl, *Rechtsphilosophie*, p. 231 sq.; Warnkönig, *Juristische Encyklopödie*, p. 64 sq.; Dernburg, *Pandekten*, I § 41; Regelsberger, *Pandekten*, I, § 13, 1; Gierke, *Deutsches Privatrecht*, I, § 28; Neuner, *Wesen u. Arten d. Privatrechtsverhältnisse* (1866); Schuppe, *Begriff d. subjektiven Rechts* (1887); Müller, *Elemente d. Rechtsbildung u. d. Rechts* (1877), § 14; Bekker, *System d. Neut Pandektenrechts* (1886-1889), I, 46 sq.

and that even when it seems to recognize the antecedent elements of jural causation, it does so unofficially—that, in the last analysis, it is what the law does that counts, and not what the officers of the state, in the administration of justice or in the making of legislation, promise or threaten. Not even a complete legislative statement of primary rights, in this view, would alter the matter, since, in the last analysis, all that had been declared could conceivably be disregarded, and, in actual practice, would be disregarded in part. Everything, in short, which attempts to predict what form state interference will take measured in terms of rights or claims may belong to the logic of probabilities, but it cannot be real. Its reality is not even created by future demonstration of the correctness of the probability, since reality can only be measured by reality.[62] Such, in a general way, would be the interpretation of jural relation from the point of view of realistic monism.

The other variety, rationalistic monism, would put all the emphasis on rights or on certain kinds of rights. This is objectionable on two grounds: (*a*) it divorces procedural "rights" (powers), stopping short at the point where primary rights may be realized; and (*b*) it does not include (at least not by name or description) the important group of non-procedural powers. It is more difficult to justify this narrow application of jural relation to situations of correlated rights and duties than the realistic monism which confines the term to the power to proceed in a court of law or by self-help.

The dualistic view—dualistic in two senses: (*a*) in including both rights and powers, and (*b*) in including both substantive and procedural claims—is the one we prefer to adopt. The reason may briefly be stated. The rational (hypothetical) and actual (existential) phases of legal science should be harmonized. They are harmonized in actual life both in theory and practice. Other sciences, especially sociology and ethics, may and do separate them, but legal science would be sterile if one were systematically detached from the other. It is also of the greatest practical advantage that the union be maintained since the two fields are mutually correlative. Theory, on one hand, may influence the facts of justice, and legal justice is constantly opening up new fields of research for theory. A tentative definition based on this view is as follows:

[62] *Cf.* Prof. Joseph H. Bingham, "What is the Law?", 11 Mich. Law Rev. Nos. 1, 2.

A jural relation is a situation of legal and material fact upon which one by his own will may restrict or claim to restrict, presently or contingently, with the aid of the law, freedom of action of another.[63]

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[63]*Cf.* Foulke, Definition and Nature of Law, 19 Columbia Law Rev. 351, 352. "We do not enter the region of law until we reach the limits of restrained conduct."